No. 96-___

In The

Supreme Court of the United States

October Term, 1995

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When Congress has clearly stated that rights to modify Longshore and Harbor Workers' Compensation Act awards should end one year after the last payment of compensation, may a Court of Appeals order a small award "fashioned expressly" to indefinitely extend that period?

LIST OF PARTIES

The parties to the proceeding resulting in the decision sought to be reviewed are:

John Rambo

Metropolitan Stevedore Company;[1] and

Director, Office of Workers' Compensation Programs, United States Department of Labor

[1] In accordance with Rules 14.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Metropolitan Stevedore Company (hereinafter "Metropolitan") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Ninth Circuit (Appendix 2a) is reported at 81 F.3d 840. The Order denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc* (App. 1a) is unpublished. The Opinion of the Ninth Circuit originally reversed by this Court (App. 17a) is reported at 28 F.3d 86. The Decision and Order of the Benefits Review Board (App. 21a) and the Administrative Law Judge's Decision and Order Granting Modification (App. 26a) are unreported.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 10, 1996. (App. 2a) A timely Petition for Rehearing filed by Metropolitan was denied on May 22, 1996. (App. 1a) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 22 of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act"), 33 U.S.C. Section 922, provides in relevant part as follows:

MODIFICATION OF AWARDS

> Sec. 22. Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . , the deputy commissioner may *at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim,* review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. [emphasis added]

STATEMENT

Much of the factual background pertinent to the question presented was summarized within this Court's opinion in *Metropolitan Stevedore Co. v. Rambo (Rambo I),* 115 S.Ct. 2144 (1995).

> In 1980, respondent John Rambo injured his back and leg while working as a longshore frontman for petitioner Metropolitan Stevedore Company. Rambo filed a claim with the Department of Labor that was submitted to an Administrative Law Judge. After Rambo and petitioner

> stipulated that Rambo sustained a 22 1/2 % permanent partial disability and a corresponding $120.24 decrease in his $534.38 weekly wage, the ALJ, pursuant to LHWCA § 8(c)(21) awarded Rambo 66 2/3 % of that figure, or $80.16 per week.
>
> After the award, Rambo began attending crane school. With the new skills so acquired, he obtained longshore work as a crane operator. He also worked in his spare time as a heavy lift truck operator. Between 1985 and 1990, Rambo's average weekly wages ranged between $1,307.81 and $1,690.50, more than three times his pre-injury earnings, though his physical condition remained unchanged. In light of the increased wage-earning capacity, petitioner . . . filed an application to modify the disability award under LHWCA § 22. Petitioner asserted there had been a 'change in conditions' so that respondent was no longer 'disabled' under the Act. The ALJ agreed that an award may be modified based on changes in the employee's wage-earning capacity, even absent a change in physical condition. After discounting wage increases due to inflation and considering petitioner's risk of job loss and other employment prospects, the ALJ concluded Rambo 'no longer has a wage-earning capacity loss' and terminated his disability payments. App. 68. The Benefits Review Board affirmed, relying on *Fleetwood v. Newport News Shipping & Dry Dock Co.*, 16 BRBS 282 (1984), aff'd, 776 F.2d 1225 (CA4 1985), which held that 'change in condition[s]' means change in wage-earning capacity, as well as change in physical condition. App. 73. A panel of the Court of Appeals for the Ninth Circuit reversed. *Rambo v. Director,* OWCP, 28

> F.3d 86 (1994). Rejecting the Fourth Circuit's approach in *Fleetwood*, the Ninth Circuit held that LHWCA § 22 authorizes modification of an award only where there has been a change in the claimant's physical condition. We granted certiorari to resolve this split, 513 U.S. ___, 115 S.Ct. 787, 130 L.Ed.2d 779 (1995), and now reverse.

Rambo I, 115 S.Ct. at 2146-47.

This Court reversed because the Ninth Circuit had disregarded the plain language of the statute and had applied a definition of "change in conditions" which was inconsistent with the structure, purpose, and history of the LHWCA. Because Rambo had raised other arguments which the Ninth Circuit had not addressed, the case was remanded for further proceedings consistent with this Court's opinion.

On remand, the Ninth Circuit reversed the Order terminating Rambo's benefits and ordered entry of a small award

> [F]ashioned expressly for the purpose of preserving [Rambo's] right to receive compensation should disability in an economic sense ever visit him.

Rambo v. Director, Office of Workers' Compensation Programs (Rambo II), 81 F.3d 840, 844 (9th Cir. 1996). (App. 14a)

The Ninth Circuit acknowledged that entry of the small award would indefinitely extend the statute's one-year limitation period. However, it thought indefinite extension appropriate because Rambo might at some future time suffer economic harm and because the Ninth

Circuit perceived no statutory protections against that possibility.

> While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination. Thus, it is an appropriate mechanism. . . .

Rambo II, 81 F.3d at 844. (App. 13a) A Request for Rehearing was filed for Metropolitan. The request was denied and the accompanying Suggestion for Rehearing *En Banc* rejected.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided an important question of federal law in a way that *cannot* be reconciled with either this Court's opinion in *Rambo I* or Congress's clearly expressed judgment that there should be a one-year limitation on the period during which a party may seek modification.

The statutory language could not be more clear. Section 22 permits modification *only* within "one year after the date of the last payment of compensation . . . [or] one year after the rejection of a claim." In *Rambo I*, this Court directed the Ninth Circuit to base its conclusions upon the language of the statute, expressly noting that Congress has repeatedly declined to extend the one-year limitations period. *Rambo I*, 115 S.Ct. 2144, 2149. In *Rambo II*, the Ninth Circuit substituted its judgment for that of

Congress and disobeyed this Court's repeated admonition that only Congress has the authority to change statutes.

These circumstances call for an exercise of this Court's power of supervision and a ruling which makes clear to the Ninth Circuit that, however much it may question Congress's wisdom or fairness, it *must* enforce the Legislature's clearly expressed judgments.

The Ninth Circuit's refusals to obey Congress's judgment and this Court's repeated rulings that clearly stated legislative choices must be implemented are not the only reasons for review. In its singular haste to imprint its own perceptions of wisdom and fairness upon the statutory language, the Ninth Circuit once again rejected the interpretation of Section 22 adopted by the Fourth Circuit in *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985) and, once again, prevented the uniform application which the LHWCA requires.[2]

Unless *Rambo II* is reversed, maritime employers within the Ninth Circuit will be required to pay compensation benefits to workers who *may* at some future date experience the loss compensation is meant to replace. Unless *Rambo II* is reversed, maritime workers within the Ninth Circuit who experience *neither* current *nor* probable economic loss will be awarded benefits because loss *may*

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[2] Indeed, this Court's recognition of the need for a nationally uniform maritime compensation system forced enactment of the LHWCA. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); and *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

at some future date materialize. In no other circuit does a mere *possibility* of future harm trigger current benefit entitlement.

A. The Plain Language Of Section 22 And Its History Document The Legislative Judgment That The Period For Award Modification Should Be Strictly Limited To One Year.

The legislative history underlying Section 22 is well known, reported at length in *Rambo I*, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 463-65 (1968), and *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 8-11 (1975).

Section 22 was first enacted as part of the original Longshoremen's and Harbor Workers' Compensation Act in 1927. 44 Stat. 1437. As originally enacted, time limits on award modification were *very* strict; review was permitted only *during* the term of an award.

Between 1930 and 1933, the United States Employees' Compensation Commission, the agency charged with administering the Act, on four occasions recommended that Section 22's time limitation be extended to permit review at any time. 14th Ann. Rep. of the United States Employees' Compensation Commission ("USECC") 75 (1930); 15th Ann. Rep. USECC 77 (1931); 16th Ann. Rep. USECC 49 (1932); 17th Ann. Rep. USECC 18 (1933). In 1934, Congress rejected the USECC's recommendations that there be an unlimited time period for modification and, instead, chose to impose a one-year time limit. 48 Stat. 807.

In its annual reports for 1934-36, the Compensation Commission recommended that modification rights, originally present only when compensation had been awarded, be extended to cases where the original compensation claim had been rejected. 18th Ann. Rep. USECC 38 (1934); 19th Ann. Rep. USECC 49 (1935); 20th Ann. Rep. USECC 52 (1936). In 1938, Congress accepted this proposal but made the expanded modification remedy subject to the same one-year limitation. 52 Stat. 1167. While enacting this change, Congress once again recorded its judgment that, while the grounds for modification should be broad, the time period should be strictly limited.

> Section 5 of S. 2794 [H.R. 8057] amends Section 22 of the existing Act [by adding 'mistaken in a determination of fact'] so as to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting' the time period, extends the time within which such modification may be made.

S. Rep. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934).

In 1938, Congress again revisited the issue. Aware that the one-year time limitation might cause hardship if only the current effects of injury were considered when determining wage-earning capacity, Congress did not choose to "indefinitely extend" the period for modification. Instead, Congress chose to enact Sections 8(h) and (i), 33 U.S.C. Sections 908(h) and (i), to (a) permit consideration of future economic consequences of impairment when initially determining the amount of an award and

(b) avoid frequent award adjustments over long periods of time by authorizing post-award settlements.

> [The proposed amendment adding subdivision (h) to Section 8] also provides for consideration of the effects of an injury, causing permanent partial disability, upon the employee's future ability to earn. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which the courts have found to be just and proper. . . . considering not only the present effect of the disability on the employee's wage-earning capacity but also the future consequences of such disability on the employee's capacity to earn as it naturally extends into the future.
>
> * * *
>
> In a case such as that referred to above where the employee returns to employment without apparent wage loss, notwithstanding impairment of physical condition and probable impairment of future wage earning capacity, an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the limitations in the Act with respect to the filing of the claim for compensation and the right of review of the case (sec. 22) had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the beneficent provisions of the Longshoremen's Act.

* * *

The suggested addition of subdivision (i) to section 8 is designed to afford the interested parties the opportunity of amicably disposing of cases upon agreed settlements approved by the deputy commissioner, after approval by the Commission, where awards have been made under section 8(c)(21) and section 8(e). Experience shows that in many cases involving disabilities under these provisions (by which compensation is based on loss of earning capacity and is subject to readjustment from time to time over long periods) agreed settlements as approved by the deputy commissioner, with approval of the Commission, would be desirable and in the interest of all parties concerned.

S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938).

Section 22's time limitation was not again considered by Congress until 1983. In that year, it was once again proposed that the one-year time limitation on modification be removed. S. Rep. No. 98-81, 98th Cong., 1st Sess. 73 (1983); H.R. Rep. No. 98-570, 98th Cong., 1st Sess. 61 (1983). As finally enacted, the law *retained* the existing one-year time limitation on Section 22 modifications.

If there is any ambiguity whatsoever in the plain language of Section 22's one-year time limitation, the history of the LHWCA removes any doubt. Over the past 70 years, Congress has repeatedly considered and reconsidered the wisdom and fairness of the one-year time limitation. *Each* time that the issue has arisen, Congress has reconfirmed its legislative judgment that the time limitation should be retained and strictly applied.

B. When The Plain Language And Statutory History Confirm The Legislative Judgment, That Judgment Must Be Enforced. Only Congress Possesses Authority To Change The Statute.

This Court has *repeatedly* ruled that unambiguous expressions of legislative judgment *must* be enforced in all but the most rare and exceptional cases. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1990); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). *Rambo I* itself emphasized this lesson when it criticized the Ninth Circuit for not even attempting to base its interpretation of "change in conditions" on the language of the statute itself.

> Neither Rambo nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for 'when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.'

Rambo I, 115 S.Ct. 2144, 2147. *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483-84 (1992):

> Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

The Ninth Circuit overstepped its judicial authority and usurped the legislative role when it indefinitely extended a clear one-year limitation on modification rights because it thought the one-year limitation too strict and the means Congress had chosen to alleviate hardship inadequate.

C. *Rambo II* Again Conflicts With *Fleetwood*. In No Other Circuit Is An Unproven *Possibility* Of Future Loss A Basis For Current Benefit Entitlement.

In *Fleetwood*, the Fourth Circuit rejected precisely the approach adopted in *Rambo II*. Mr. Fleetwood had suggested that because the future effects of his injury were uncertain he should receive "a one-percent permanent partial disability award as a nominal amount to protect him in case his wage-earning capacity changes after one year." The Fourth Circuit rejected that suggestion because the record lacked substantial evidence demonstrating an existing harm of uncertain degree and because Congress's solution for uncertainties regarding the future effects of disability was found within Section 8(h). *See Fleetwood, supra*, at 1235, n.9.

The Ninth Circuit concluded that a nominal award was necessary because it thought there was no other means to protect against future harm.

> While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination.

Rambo II, 81 F.3d, at 844. The Ninth Circuit either overlooked the fact that Congress had provided just such a

mechanism in Section 8(h) or forgot that courts are not free to substitute their solutions for those selected by Congress.

Rambo II makes no reference whatsoever to the Fourth Circuit's analysis of the "nominal award" issue. Instead, *Rambo II* found its inspiration in *Hole v. Miami Shipyards Corporation*, 640 F.2d 769 (5th Cir. 1981); *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984); and *La Faille v. Benefits Review Board*, 884 F.2d 54 (2d Cir. 1989). To the Ninth Circuit, these cases uniformly stood for the proposition that

> [N]ominal awards may be used to preserve a possible future award where there is a significant physical impairment without a present loss of earnings.

Rambo II, at 843. The Ninth Circuit was mistaken. The cases do *not* uniformly stand for the proposition it identified.

Hole approved the issuance of a nominal award because the Administrative Law Judge determined that Mr. Hole *did* suffer "some degree of economic harm" and because he thought issuance of a nominal award "far less arbitrary than picking a 'disability' figure out of thin air." *Hole*, at 773. In this proceeding, the Administrative Law Judge specifically determined that no current wage-earning capacity loss existed. (App. 31a)

Randall applied the *Hole* approach because there *was*

> [S]ubstantial evidence to support a determination that the claimant has suffered, or will suffer, some injury-related economic harm, but . . . insufficient evidence to allow the ALJ to

> make a reasonable assessment of the precise degree of that harm.

Randall, at 800. In this case, of course, there was no evidence that Rambo continued to suffer or would probably suffer any further injury-related economic harm. Moreover, although the Ninth Circuit thought itself free to make a factual determination that a "significant possibility" of economic harm existed, the District of Columbia Circuit properly left to the Administrative Law Judge "the determination of whether there is sufficient uncertainty concerning the extent, if any, of petitioner's harm to warrant such a *de minimis* award in this case to the ALJ."[3] *Randall*, at 800.

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[3] The Ninth Circuit's willingness to enter its own factual determination regarding the degree of future uncertainties is but another example of its refusal to recognize the limited scope of its authority on review. 33 U.S.C. Section 921(b)(3) limits appellate court review authority to a search for errors of law and adherence to the substantial evidence standard. This Court has repeatedly ruled that reviewing courts lack authority to make factual determinations or substitute their own inferences for those drawn by the statutory factfinder. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 477-78 (1947); and *Del Vecchio v. Bowers*, 296 U.S. 280, 287 (1935).

Even if the Ninth Circuit's authority on review were broad enough to permit its determination that a significant risk of economic harm existed and, based upon that determination, require entry of a nominal award without remand for further factual findings, the manner in which the Ninth Circuit divined the presence of that risk was itself irrational.

La Faille, the last of the three cases cited by the Ninth Circuit, limited its approval of the nominal award concept to situations in which substantial evidence demonstrates that future economic loss is a "predictable probability." *La Faille*, at 62. *Only* the Ninth Circuit has applied the nominal award concept when only an unproven *possibility* of future harm exists.

The Ninth Circuit's principal basis for perceiving a possibility of future loss was the fact that Mr. Rambo had at one time experienced a permanent partial disability.

> Because Rambo has suffered a permanent partial disability, there is a significant possibility that he will at some future time suffer economic harm as a result of his injury.

Rambo II, at 845. The future does not always repeat the past. From the evidence presented to him, the Administrative Law Judge concluded that the past economic loss would not recur.

> Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

(ALJ Opinion, App. 31a)

Rambo himself has never alleged that the Administrative Law Judge erred in weighing the evidence. (Board Opinion, App. 25a)

Viewed in the light *most* favorable to Rambo, the most that this record demonstrates is exactly what exists in *all* cases. Future economic loss is *always* possible. If the LHWCA and Section 7(c) of the Administrative Procedures Act, 5 U.S.C. Section 556(d), permitted an award of benefits simply because the *possibility* of future harm was proven or not disproven, formal hearings would be unnecessary. The outcome would be foreordained. This Court, however, has ruled that doubts about the future – speculative or "true" – are not a sufficient basis for awards of LHWCA benefits. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries/Maher Terminals, Inc.*, 114 S.Ct. 2251 (1994).

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

DATED: August 16, 1996.

Respectfully submitted,

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APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN RAMBO, Claimant-Petitioner, v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents.	)	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 ORDER (Filed May 22, 1996)

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

* The Honorable William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO, *Claimant-Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, *Respondents.*	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 OPINION

On Remand from the United States Supreme Court

Filed April 10, 1996

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

Opinion by Judge Leavy;
Partial Concurrence and Partial Dissent by Judge Reinhardt

* The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

SUMMARY

Labor and Employment/Workers' Compensation/ Admiralty and Marine

On remand from the United States Supreme Court, the court of appeals denied a motion to dismiss, reversed an order of the Benefits Review Board (BRB), and remanded. The court held that a remand was warranted for entry of a nominal award of worker's compensation pursuant to the Longshore and Harbor Workers' Compensation Act (LHWCA), where an award modification had been requested in regard to a claimant who suffered a permanent partial disability.

Petitioner John Rambo was injured while working as a longshore frontman for respondent Metropolitan Stevedore Co. Rambo filed a claim with the Department of Labor. An administrative law judge (ALJ) awarded him $80.16 per week in worker's compensation for a permanent partial disability pursuant to the LHWCA.

Metropolitan requested an award modification to terminate Rambo's benefits. His physical condition had not changed, but he was working as a crane operator, a job that paid him almost 300 percent of his pre-injury average weekly wage. Section 22 of the LHWCA allows for modification of a disability award due to "a change in conditions." Rambo opposed the requested modification, arguing that he had been promised by Metropolitan's attorney that he would get the $80.16 weekly payment for the rest of his life, or, alternatively, that the new job was not a "change in conditions." The ALJ ruled that Rambo's award of benefits did not constitute a settlement and

could properly be modified. The ALJ also ruled that Rambo's new job was a "change in conditions" supporting modification. The ALJ terminated Rambo's benefits, and the BRB affirmed.

The court of appeals reversed the BRB in the belief that the "change in conditions" requirement required proof that Rambo had undergone a change in physical condition. The Supreme Court reversed, holding that a disability award may be modified under § 22 where there is a change in wage-earning capacity, even absent a change in the employee's physical condition. The Court remanded, noting that Rambo raised other arguments not addressed by the court of appeals. Metropolitan moved to dismiss Rambo's appeal for failure to raise issues before the ALJ and BRB.

[1] The ALJ and the BRB treated arguments by Rambo as assertions that there had been a "settlement." [2] Estoppel did not bar Metropolitan from seeking an award modification.

[3] A weekly de minimus award, in effect, extends a claimant's right to modification indefinitely. [4] Sections of the LHWCA require a "forward looking" perspective in considering whether a claimant has suffered a decline in wage-earning capacity. [5] A nominal award is the only mechanism available to incorporate the possible future effects of a disability in an award determination. A nominal award is an appropriate mechanism, especially in a modification proceeding such as Rambo's where the claimant has been given an award based on a finding of permanent partial disability. [6] In ruling that Rambo no longer had a wage-earning capacity loss and terminating

his award, the ALJ overemphasized Rambo's current status and failed to consider the effect of his permanent partial disability on future earnings. The ALJ's decision to terminate Rambo's benefits was not supported by substantial evidence. The BRB erred in affirming the ALJ's order. [7] Because Rambo suffered a permanent partial disability, there was a significant possibility that he would at a future time suffer economic harm as a result of the injury. The appropriate award modification was a small award.

Circuit Judge Reinhardt concurred in part and dissented in part, stating that the issue of whether Rambo's employer was estopped from seeking modification of the $80.16 per week compensation award could not be decided on the record.

OPINION

LEAVY, Circuit Judge:

INTRODUCTION

This appeal is before us on remand from the Supreme Court for our consideration of issues raised originally on appeal but not discussed in our earlier decision. *Rambo v. Director, Office of Workers' Compensation Programs*, 28 F.3d 86 (9th Cir.), *rev'd and remanded sub nom., Metropolitan Stevedore Co. v. Rambo*, 115 S.Ct. 2144 (1995). We now reverse the Benefits Review Board's order affirming the termination of Rambo's benefits and remand for entry of a nominal award.

FACTS AND PRIOR PROCEEDINGS

In 1980, appellant John Rambo (Rambo) injured his back and leg while working as a longshore frontman for Metropolitan Stevedore Company (Metropolitan). Rambo filed a claim with the Department of Labor that was submitted to an Administrative Law Judge (ALJ). In 1983 the ALJ awarded Rambo $80.16 per week in worker's compensation for a permanent partial disability, pursuant to § 8(c)(21) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 908(c)(21) (1986) (LHWCA). Section 22 of the LHWCA allows for modification of a disability award "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. § 922. In 1990, Metropolitan requested an award modification to terminate Rambo's benefits. Rambo's physical condition had not changed, but he was working as a crane operator, a job that paid him almost 300% of his pre-injury average weekly wage. In opposing the requested modification, Rambo argued that his award could not be modified because he had been promised by Metropolitan's attorney that he would get the $80.16 weekly payment for the rest of his life, or, alternatively, that the new job was not a "change in conditions" within the meaning of 33 U.S.C. § 922. The ALJ ruled that Rambo's award of benefits did not constitute a settlement and, therefore, could properly be modified and that Rambo's new job was a "change in conditions" that supported modification. The ALJ then terminated Rambo's benefits. The Benefits Review Board (BRB) affirmed.

We reversed the BRB in the belief that the "change in conditions" requirement for an award modification under § 922 required proof that Rambo had undergone a change

in his physical condition. *Rambo*, 28 F.3d at 87. The Supreme Court reversed, holding "that a disability award may be modified under § 22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition." *Metropolitan Stevedore Co.*, 115 S.Ct. at 2150. The Supreme Court remanded the case "[b]ecause Rambo raised other arguments before the Ninth Circuit that the panel did not have the opportunity to address." *Id.*

The two issues raised by Rambo and not decided in our earlier ruling are:

> (1) Should the employer be estopped from filing a 33 U.S.C. § 922 Petition for Modification because of the representation of its attorney to "Rambo" that the award would be paid for life?
>
> (2) Given the 1983 Stipulated Decision and Order Permanent Disability Benefits, "in the interest of justice", should this case be remanded for the entry of a nominal award of loss of wage earning capacity?

Petitioner's Opening Brief at 7 & 9. Metropolitan moves to dismiss Rambo's appeal on the ground that these issues were not raised before the ALJ or BRB.

ANALYSIS

Standards of Review

The BRB must accept the ALJ's factual findings if they are supported by substantial evidence. 33 U.S.C. § 921(b)(3). BRB decisions are reviewed by the appellate courts for "errors of law and adherence to the substantial evidence standard." *Metropolitan Stevedore Co. v. Brickner*,

11 F.3d 887, 889 (9th Cir.1993) (internal quotations omitted). Because the Board is not a policy-making agency, its interpretation of the LHWCA is not entitled to any special deference from the courts. We have noted, however, that we will "respect the Board's interpretation of the statute 'where that interpretation is reasonable and reflects the policy underlying the statute.' " *Long v. Director, Office of Workers' Compensation Programs*, 767 F.2d 1578, 1580 (9th Cir.1985) (citations omitted) (quoting *National Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 880 (9th Cir.1979)).

Discussion

Metropolitan moves to dismiss Rambo's appeal for failure to raise the issues before the ALJ and BRB. Issues not raised before these bodies will not be heard on appeal. *Goldsmith v. Director, Office of Workers' Compensation Programs*, 838 F.2d 1079, 1081 (9th Cir.1988); *Long*, 767 F.2d at 1583.

> There is no bright-line rule to determine whether a matter has been properly raised. A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it. *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir.1989) (citations omitted).

1. *Estoppel.*

Rambo argued to the ALJ that Metropolitan's Application for Modification under § 922 "should be dismissed because the parties settled this claim in 1983. . . . The employer agreed to pay $80.16 per week 'indefinitely.' "

On appeal to the BRB Rambo argued that there was a "settlement" between the parties and that Metropolitan was "estopped" from withdrawing from the settlement.

[1] Both the ALJ and BRB treated Rambo's arguments as assertions that the 1983 Order constituted a settlement under 33 U.S.C. § 908(i)(1). They found that the Order was not a statutory settlement and, consequently, Metropolitan could seek modification under § 922. Neither the ALJ nor the BRB ruled on the estoppel issue. That they did not rule on it is not controlling, however, if the issue was sufficiently raised below for the ALJ and BRB to rule on it. *Smiley v. Director*, 984 F.2d 278, 281 (9th Cir.1993). The ALJ and the BRB could have ruled on the estoppel issue. Thus, Rambo can raise the estoppel argument on appeal.

Application of the estoppel doctrine requires four elements: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Ellenburg v. Brockway*, 763 F.2d 1091, 1096 (9th Cir.1985) (citing *Lavin v. Marsh*, 644 F.2d 1378, 1382 (9th Cir.1981); 1 S. Williston, Williston on Contracts § 139 (3d ed. 1957)). Rambo testified before the ALJ that, on the day of his 1983 hearing, he met with his attorney and Metropolitan's attorney and they both told him that he was going to receive $80.16 per week for life. Rambo didn't recall whether his attorney told him the award could be modified. $80.16 is what Rambo was entitled to under the LHWCA for a 22½% permanent partial disability based on an average pre-injury weekly

wage of $534.38. 33 U.S.C. § 908(c)(23) (compensation equals 66²/₃% of average weekly wages multiplied by the percentage of permanent impairment). The parties stipulated to the injury, the degree of disability, the compensation rate, and to an award of $80.16 per week "subject to . . . all other provisions of the [LHWCA]."

[2] Rambo received no less an award than he was entitled to under the statute. Both the ALJ and BRB determined that the 1983 "Decision and Order – Awarding Benefits" was not a settlement of Rambo's claim against Metropolitan, but an award of benefits based on the parties' stipulations and subject to modification under § 922. Thus, at least one of the elements necessary for application of estoppel is missing: reliance on Metropolitan to Rambo's detriment. Estoppel does not bar Metropolitan from seeking an award modification.

2. *Nominal Award.*

Even though Rambo did not specifically mention a nominal award before the ALJ or BRB we can consider the propriety of a nominal award on appeal. "A claim for total disability benefits includes any lesser degree of disability." *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201, 204 n. 2 (1985). By contesting downward modification of his award, Rambo was asserting his right to an award of any size.

Rambo argues that the BRB should have modified his award to a nominal amount "in the interest of justice," rather than terminating it entirely. We have not determined the propriety of a nominal award to preserve the

right to future benefits in either an initial award determination or, as here, in a modification proceeding. *See Todd Shipyards v. Office of Workers' Compensation*, 792 F.2d 1489, 1491 (9th Cir.1986). The Second, Fifth, and District of Columbia Circuits have ruled that nominal awards may be used to preserve a possible future award where there is a significant physical impairment without a present loss of earnings. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 62 (2nd Cir.1989); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 772 (5th Cir.1981); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C.Cir.1984).

[3] The BRB, however, "has repeatedly expressed its dissatisfaction with de minimis awards of benefits, viewing them as judicially created infringements upon the province of the legislature because they indefinitely extend the time period provided for modification by Section 22." *Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988) (citations omitted). Under § 922, a compensation case may be reviewed and a new compensation order issued, which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or rejection of the claim. Thus, an initial finding of no economic disability may be modified only within one year of such finding, but a weekly de minimus award, in effect, extends a claimant's right to modification indefinitely.

Section 8(h), 33 U.S.C. § 908(h), sets forth how wage-earning capacity in cases of partial disability is determined:

> (h) The wage-earning capacity of an injured employee in cases of partial disability

under subsection (c)(21) of this section [permanent partial disability] . . . shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.*

33 U.S.C. § 908(h) (emphasis added).

[4] This section "allows the [ALJ] to consider the future effects of a disability." *Todd Shipyards Corp. v. Allan*, 666 F.2d 399 (9th Cir.1982), *cert. denied*, 459 U.S. 1034, 103 S.Ct. 444, 74 L.Ed.2d 600, *citing Hole*, 640 F.2d at 772; *Lumber Mut. Casualty Ins. Co. v. O'Keefe*, 217 F.2d 720, 723 (2d Cir.1954); *Hughes v. Litton Systems, Inc.*, 6 BRBS 301 (1977).

> The disability award provided for under the Act is designed to compensate claimants for reductions in wage-earning capacity, resulting from the injury, as they may occur throughout the claimant's lifetime. The Benefits Review Board and the courts have mandated this "forward-looking perspective" precisely because of the short statute of limitations.

Randall, 725 F.2d at 795 (citations omitted). Both § 908 and § 922 require a "forward looking" perspective in considering whether a claimant has suffered a decline in wage-earning capacity. *Hole*, 640 F.2d at 772 (citations omitted).

[5] While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination. Thus, it is an appropriate mechanism, especially in a modification proceeding such as Rambo's where the claimant has already been given an award based on a finding of permanent partial disability.

Here the evidence is uncontroverted that Rambo's permanent partial disability reduced his ability to perform his pre-injury work. This wage-earning capacity loss was sufficient to support a weekly benefits award. Rambo's physical condition remains unchanged. The evidence was also that Rambo, at the present time, was employed as a crane operator and was earning more than he had before his injury. Rambo also testified that he didn't know how long his job as a crane operator would last.

[6] In ruling that Rambo no longer had a wage-earning capacity loss and terminating his award, the ALJ overemphasized Rambo's current status and failed to consider the effect of Rambo's permanent partial disability on his future earnings. Looking at the evidence as a whole, the ALJ's decision to terminate Rambo's benefits is not supported by substantial evidence and the BRB erred in affirming the ALJ's order.

[7] Because Rambo has suffered a permanent partial disability, there is a significant possibility that he will at some future time suffer economic harm as a result of his injury. The LHWCA mandates a forward look in award determinations. Thus, the appropriate award modification is a small award "fashioned expressly for the purpose of preserving [Rambo's] right to receive compensation should disability in an economic sense ever visit him." *Hole*, 640 F.2d at 773.

CONCLUSION

Metropolitan's motion to dismiss is DENIED. The BRB's order affirming the termination of Rambo's benefits is REVERSED and REMANDED for entry of a nominal award.

REINHARDT, Circuit Judge, concurring in part, dissenting in part:

I dissent because the issue whether Rambo's employer is estopped from seeking modification of his $80.16 per week compensation award cannot be decided on the record before us.

Rambo argues that Metropolitan is estopped from seeking modification pursuant to 33 U.S.C. § 922 because its attorney-representative told Rambo before he agreed to numerous stipulations that the stipulated award of $80.16 would be paid to him "for life." The majority somehow concludes either that (1) Rambo did not rely on the statements of Metropolitan's attorney or (2) he did not rely on them to his detriment. I do not think the

record is sufficiently developed to permit us to reach either conclusion.

If Rambo relied on a promise by Metropolitan of an agreed-upon payment of $80.16 per week for the rest of his life and if he could have established a greater percentage of disability had he proceeded to trial as opposed to stipulating to a 22½% disability, there would be no question that he relied on Metropolitan's representation to his detriment. Unfortunately, the record before us sheds little, if any, light on the crucial issues: whether Metropolitan's counsel promised Rambo that he would receive an award that would provide a weekly payment in a fixed amount "for life;" whether, if such promise was made by Metropolitan's counsel, Rambo relied on it; and, finally, whether Rambo could have established a greater percentage disability if he had proceeded to trial.

According to Rambo, his employer's attorney did indeed promise him $80.16 per week for the rest of his life. Rambo argues that he agreed to a disability of "22½%" following the conversation during which the promise was made to him. Before us, as he did below, Rambo contends that he was induced to limit his claim to 22½% disability and not to proceed to trial by his employer's promise of a set payment for life.

The fact that the ALJ's Statement of Stipulations contained a boilerplate parenthetical phrase – "subject to . . . all other provisions of the Act" – that can be construed to subject Rambo's award to § 922 modification is by no means dispositive of whether Rambo relied on the statements of his employer's representative to his detriment. Whether Rambo was led to believe that his

agreement with Metropolitan would provide indefinite or permanent relief notwithstanding the inclusion of that parenthetical phrase in the stipulation is a factual question that should be remanded to the Benefits Review Board. I would remand the matter for further factual development that would enable the Board to resolve the estoppel issue properly.

Given the majority's disposition of the estoppel issue, however, I would agree with my colleagues that the Board erred in terminating Rambo's benefits rather than modifying them so as to provide for a nominal award. Thus, while I dissent from Section 1 of the majority opinion, I concur in Section 2.

APPENDIX 3

Cite as 94 C.D.O.S. 4781

JOHN RAMBO, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents,

No. 92-70783

United States Court of Appeals for the Ninth Circuit

OWCP No. 18-6945 BRB No. 91-1538

Petition for Review of an Order of the Benefits Review Board Argued and Submitted March 14, 1994 – San Francisco, California

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

COUNSEL

Thomas J. Pierry, Magana, Cathcart, McCarthy & Pierry, Wilmington, California, for the petitioner.

LuAnn Kressley, United States Department of Labor, Office of the Solicitor, Washington, D.C., for the respondents.

Filed June 24, 1994

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for the benefits because he was presently working at a job that paid him $1,505.21 per week – almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. § 922.[1] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's *physical* condition can justify an award modification. A change in a claimant's wages, training,

[1] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

Analysis

Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages – without proof of a change in his physical condition – was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. § 922. *See* id. at 86 (rejecting the petition for modification because it was not based upon *"a change in physical condition,"* but rather upon the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. § 922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. See id. at 1235 (Warriner, J., dissenting) (noting that "[b]eginning

with the first opinion dealing with the question, [*McCormick,*] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. § 922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent, *United States v. Lewis*, 991 F.2d 524, 525 n.1 (9th Cir.), *cert. denied*, 114 S.Ct. 216 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury*, and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED

APPENDIX 4

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

(seal)

BRB No. 91-1538

JOHN RAMBO Claimant-Petitioner	)	**NOT PUBLISHED**
v.	)	
METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DECISION AND ORDER (Filed Nov. 9, 1992)

Appeal of the Decision and Order Granting Modification of Daniel Lee Stewart, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry (Magana, Cathcart, McCarthy & Pierry), Wilmington, California, for claimant.

James J. Wood, Long Beach, California, for self-insured employer.

LuAnn Kressley (Marshall J. Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification (83-LHC-242) of Administrative Law Judge Daniel Lee Stewart on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 9, 1980, claimant injured his back and leg while working for employer. In a Decision and Order dated November 28, 1983, Administrative Law Judge James J. Butler awarded claimant temporary total disability compensation from September 10, 1980 through November 22, 1981, and permanent partial disability compensation thereafter. Pursuant to the stipulations of the parties, the administrative law judge found that claimant's average weekly wage at the time of injury was $534.38, that claimant had sustained a 22 1/2 percent impairment of the whole person which the parties equated to a $120.24 per week loss in wage-earning capacity, and that accordingly claimant was entitled to permanent partial disability compensation based on an $80.16 per week compensation rate. In addition, the administrative

law judge awarded claimant's counsel an attorney's fee payable by employer, *see* 33 U.S.C. §928, and awarded employer relief pursuant to Section 8(f), 33 U.S.C. §908(f).

Thereafter on October 30, 1989, employer sought modification of the permanent partial disability award pursuant to Section 22, 33 U.S.C. §922, arguing that there had been a change in claimant's wage-earning capacity such that he is no longer disabled. In a Decision and Order dated May 29, 1991, Administrative Law Judge Daniel Lee Stewart granted modification, noting that claimant had completed training and was currently working as a crane operator, a higher paying yet less strenuous job, which he had been performing for four or five years and was not in danger of losing. In addition, Judge Stewart noted that claimant also was able to obtain additional pay by volunteering to work as a lift truck operator and heavy lift truck operator. Finally, Judge Stewart found that claimant's average weekly wage had more than tripled between the time of his injury in 1980 and the hearing in 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, he concluded that claimant no longer had a loss in his wage-earning capacity. The administrative law judge therefore ordered that the award of permanent partial disability compensation be terminated as of the date of the decision and order. Claimant appeals, arguing that the granting of modification was improper. Employer and the Director, Office of Worker's Compensation Programs, respond, urging affirmance.

Under Section 22 an aggrieved party may seek modification of a compensation award within one year of the

date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. 33 U.S.C. §922. With the enactment of the 1984 Amendments to the Act, Section 22 was amended to prohibit the modification of settlements which were entered into pursuant to Section 8(i), 33 U.S.C. §908(i)(1988). The Board had previously reached the same conclusion under the pre-1984 Act. *See Lambert v. Atlantic & Gulf Stevedores,* 17 BRBS 68 (1985).

Initially, we reject claimant's assertion that Judge Butler's original Decision and Order constitutes the approval of a Section 8(i) settlement which could not be modified pursuant to Section 22. This decision fails to provide for the complete discharge of employer's liability and lacks any findings as to whether the compensation awarded was in claimant's best interest as was required under Section 8(i) at the time of Judge Butler's decision. 33 U.S.C. §908(i) (1982) (amended 1984). Accordingly, Judge Butler's Decision and Order was, as Judge Stewart properly determined, simply an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22. *Norton v. National Steel & Shipbuilding Co.,* 25 BRBS 79, 84 (1991); *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988).

Claimant's contention that the administrative law judge erred in granting modification absent a showing of a change in his physical condition is similarly without merit. Contrary to claimant's assertions Judge Stewart correctly recognized that modification pursuant to Section 22 may be granted based solely upon a change in claimant's economic condition. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.,* 776 F.2d 1225, 18

BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores,* 25 BRBS 260 (1991); *Moore v. Washington Metropolitan Area Transit Authority,* 23 BRBS 49 (1989). Claimant has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on claimant's increase in wage-earning capacity after the original award of benefits. We therefore affirm his determination that claimant was no longer disabled as of the date of his decision.

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals
Judge

/s/ Nance S. Dolder
NANCY S. DOLDER
Administrative Appeals
Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals
Judge

APPENDIX 5

U.S. Department of Labor Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California
94105

(seal)

In the Matter of	)	
JOHN RAMBO	)	Case No.
Claimant	)	83-LHC-242
against	)	OWCP No.
METROPOLITAN STEVEDORE COMPANY,	)	18-6945
Self-Administered Employer	)	

DECISION AND ORDER GRANTING MODIFICATION

This proceeding involves a request for modification of the November 28, 1983, Decision and Order Awarding Benefits of Administrative Law Judge Butler. The request for modification was filed on October 30, 1989, pursuant to the provisions of 30 U.S.C. § 922.

ISSUES

1. Whether the employer's request for modification of the 1983 Decision and Order under the provisions of 30 U.S.C. § 922 should be granted.
2. Whether the administrative law judge who approved the settlement is the one required to rule on the issue of modification.

Background

The parties stipulated that the Claimant, John Rambo, became permanently, partially disabled as the result of an injury to his back and leg sustained on September 9, 1980; that the Claimant's condition became permanent and stationary on November 16, 1981; and that the Claimant sustained an overall current permanent partial disability equivalent to 22½% of the whole person amounting to a compensation rate of $80.16 per week for permanent partial disability. This stipulated "settlement" was incorporated into a Decision and Order of the administrative law judge. The only issue which the administrative law judge decided in his Decision and Order was whether § 908(f) was applicable.

Then, on October 30, 1989, Employer filed an application for modification under Section 922 alleging that the Claimant's current earning capacity had increased substantially.

JURISDICTION

A. Administrative Law Judge

Claimant alleges that the motion for modification must be heard by the same administrative law judge assigned to the original claim. This allegation is without merit. In *Finch v. Newport News Shipbuilding and Dry Dock Company*, 22 BRBS 196 (1989), the Benefits Review Board held that there is no requirement under the Act that a motion for modification must be heard by the same administrative law judge assigned to the original claim.

B. Section 922 Modification

Claimant contends that the stipulations contained in the November 28, 1983, Decision and Order of the administrative law judge constitute a settlement between the parties. However, Judge Butler's Decision and Order awarding benefits does not constitute the approval of a settlement because it fails to provide in specific terminology for the complete discharge of employer's liability and does not contain findings as to whether the compensation awarded was in the Claimant's best interest as is required under Section 8(i) of the Act. *Finch v. Newport News Shipbuilding and Dry Dock Company, supra.* Therefore, Judge Butler's Decision and Order must be considered as an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22.

DISCUSSION

In the original Decision and Order dated November 28, 1983, it was stipulated that the Claimant's average weekly wages were $534.38 per week at the time of the pertinent injury, that Claimant sustained an overall current permanent partial disability equivalent to 22.5% of the whole person which produced a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

Section 22 of the Act, 33 U.S.C. §922, authorizes the modification of a Decision and Order based on a change in condition or mistake of fact at any time prior to one year after the last payment of compensation. Modification based on a change in condition may be granted in cases in

which the claimant's economic condition has changed following the entry of an award of compensation. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company,* 16 BRBS 282 (1984).

Employer in the instant case contends that since Claimant is presently earning more money than at the time of his injury, Claimant did not have a loss of wage-earning capacity. However, higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.,* 10 BRBS 649 (1979). One has to consider wage-earning capacity in an open labor market under normal employment conditions.

Claimant testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working fulltime as a longshoreman (Tr. 27-8).[1] He is presently working steadily as a crane operator for American President Lines (Tr. 28, 32). He has been working as a crane operator for four or five years (Tr. 28). In addition to working as a crane operator, Claimant volunteers for work as a lift truck operator and a heavy lift truck operator for which he receives additional pay (Tr. 28-30). When Claimant works as a crane operator, he works most of the time as a gantry crane operator (Tr. 31). The crane which he operates is 131 feet high (Tr. 31). In order to reach the place where he works, Claimant has to climb a 12 to 15 foot ladder and then take an elevator (Tr.

[1] In this decision, "CX" refers to Claimant's Exhibits, "EX" refers to Employer's Exhibits and "Tr." refers to the transcript of the hearing.

31). As a crane operator, he is not allowed under the contract to work more than 42.5 hours per week (Tr. 33).

According to the Claimant, he is now making $1,550.00 per week (Tr. 36). He prefers doing crane work because it pays more money and it is easier work than some of the other jobs (Tr. 38).

Claimant testified that his physical condition since 1983, when he was awarded permanent partial disability, has remained about the same (Tr. 38-9).

According to the Claimant, Matson Lines has laid off 50 men; however, there has been no indication by the company for which he works that anyone is going to be laid off (Tr. 34).

The evidence in the instant case shows that Claimant earned a total of $70,662.67 for 1985 for an average weekly wage of $1,358.90; a total of $68,006.22 for 1986 for an average weekly wage of $1,307.81; a total of $67,953.72 for 1987 for an average weekly wage of $1,306.80; a total of $76,332.19 for 1988, for an average weekly wage of $1,467.93; a total of $87,873.53 for the work beginning December 31, 1988, and ending December 23, 1989, for an average weekly wage of $1,689.88; and a total of $67,619.96 for the week beginning December 30, 1989, and ending September 22, 1990, for an average weekly wage of $1,690.50.

Claimant's average weekly wages have increased from $534.38 per week in 1980 when Claimant was injured to $1,690.50 as of September 22, 1990. This demonstrates that the Claimant's average weekly wages more

than tripled from 1980 to 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, it is evident that Claimant no longer has a wage-earning capacity loss. Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator, but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

Accordingly, I find that the Claimant no longer has a wage-earning capacity loss and that his disability payments should be discontinued effective on the date of this Decision and Order.

ATTORNEY'S FEES

Inasmuch as the Claimant did not prevail in this proceeding, the attorney is not entitled to any fee.

ORDER

It is hereby ORDERED that Claimant's disability be terminated effective as of the date of this Decision and Order.

/s/ Daniel Lee Stewart
DANIEL LEE STEWART
Administrative Law Judge

Dated: MAY 29, 1991
San Francisco, California

DLS:bll